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Nos. 77-1612 and 77-1761

In the Supreme Court of the United States

OCTOBER TERM, 1977

DAVID STIRLING, JR., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

RUBEL L. PHILLIPS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A)[1] is reported at 571 F.2d 708.

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[1] "Pet. App." refers to the appendix to the petition in No. 77-1612.

JURISDICTION

The judgment of the court of appeals was entered on February 2, 1978. A timely petition for rehearing and suggestion of rehearing *en banc* was denied on April 13, 1978. The petition for a writ of certiorari in No. 77-1612 was filed on May 11, 1978. On May 3, 1978, Mr. Justice Marshall extended the time for filing the petition in No. 77-1761 until June 12, 1978, and the petition was filed on that day. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioners' convictions were obtained in violation of the privilege against compulsory self-incrimination or the Double Jeopardy Clause.

2. Whether the trial court's charge on the materiality of petitioners' misrepresentations was correct.

3. Whether the trial court's instructions on the credibility of witnesses and reliance on expert advice were proper.

4. Whether the trial court properly permitted the prosecutor to question petitioner David Stirling on cross-examination concerning his prior plea of guilty in a related federal prosecution.

5. Whether the denial of petitioner Phillips' motion for a severance constituted an abuse of discretion.

STATEMENT

Following a jury trial in the United States District Court for the Southern District of New York, petitioners were each convicted on nine counts of securities fraud, mail fraud, and conspiracy.[2] Each was fined and sentenced to concurrent prison terms on the eight substantive counts;[3] sentences on the conspiracy count were suspended. The court of appeals affirmed in a comprehensive opinion (Pet. App. A).

The facts are set forth in detail in the opinion of the court of appeals (Pet. App. 3a, 7a-28a). Petitioners were officers and directors of the Stirling Homex Corporation (Homex), which was engaged in the

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[2] Count One charged petitioners with having devised a multi-million dollar scheme to defraud investors in violation of 15 U.S.C. 77q(a) and 77x; Count Two charged petitioners with making false statements in a registration statement filed with the Securities and Exchange Commission, in violation of 15 U.S.C. 77x; Counts Three through Eight charged them with mail fraud, in violation of 18 U.S.C. 1341; and Count Nine charged a conspiracy to defraud the United States and to violate 18 U.S.C. 1001, 18 U.S.C. 1341 and 15 U.S.C. 77q(a), 77x and 78ff, in violation of 18 U.S.C. 371.

Petitioners' co-defendant Edwin J. Schulz was also convicted on each of the nine counts charged in the indictment. He received a suspended sentence and one year's probation. His conviction was affirmed by the court of appeals.

[3] Petitioner David Stirling, Jr., was sentenced to concurrent one-year prison terms, to be followed by a one-year term of probation, and he was fined a total of $10,000. Petitioner William G. Stirling was sentenced to concurrent terms of six months' imprisonment, to be followed by one year's probation, and he was fined a total of $5,000. Petitioner Harold Yanowitch received concurrent one-year terms of imprisonment, to be followed by one year's probation, and he was fined a total of $2,000. Petitioner Rubel L. Phillips was sentenced to concurrent terms of 10 months' imprisonment, to be followed by one year's probation, and a total of $5,000 in fines.

manufacture and assembly of prefabricated multi-family modular housing. Homex was formed in 1968 and went into bankruptcy in 1972. In two separate underwritings in 1970 and 1971 Homex stock was sold to the public for approximately $39,000,000.

The evidence at trial revealed that petitioners misled the public by misrepresenting that Homex was in a sound and steadily improving financial position. The evidence further showed that the corporation's bookkeeping practices were deceptive; that three real estate transactions, represented as major land sales and used to boost apparent corporate sales totals, were in fact merely options; and that improprieties in connection with certain module sales were not disclosed. Furthermore, the company's labor relations were characterized as good without disclosure that company stock was improperly sold to union representatives at below market prices and that payment for the stock was facilitated by loans arranged and guaranteed by petitioner David Stirling. For their dealings with union representatives, petitioners David Stirling and Yanowitch were indicted in the Western District of New York on charges of violating Section 302 of the Taft-Hartley Act, 61 Stat. 157, as amended, 73 Stat. 537, 29 U.S.C. 186(a)(1). Prior to trial in the instant case, Stirling pleaded guilty to the Taft-Hartley violation and Yanowitch pleaded *nolo contendere* to that charge.

ARGUMENT

1. Petitioners contend (Pet. No. 77-1612, pp. 17-24) that their convictions violated both the privilege against compulsory self-incrimination and the Double Jeopardy Clause. Neither claim withstands analysis.

a. The self-incrimination argument is based on the fact that petitioners' securities fraud convictions rested in part upon their failure to disclose certain improprieties in Homex's labor relations. Disclosure of those improprieties, they claim, would have subjected them to prosecution under federal labor laws. Therefore, they argue, their securities fraud convictions improperly trenched on their Fifth Amendment rights. The court of appeals properly rejected this contention on the ground that the securities laws are essentially regulatory, the activity regulated is generally lawful, and the required reporting is not directed at a relatively small group of people suspected of criminal activity (Pet. App. 34a-35a). See *California* v. *Byers*, 402 U.S. 424; *Marchetti* v. *United States*, 390 U.S. 39; *Grosso* v. *United States*, 390 U.S. 62; *Shapiro* v. *United States*, 335 U.S. 1.

Beyond this, petitioners were not convicted of simply failing to disclose improper dealings with union representatives, but rather of making affirmative misleading disclosures with respect to their labor relations. They were not required to make any representations concerning their labor relations. Once they chose to do so, however, they were required to make full and accurate representations. Having determined

to make misleading disclosures, they should not now be heard to complain of the consequences. See *United States* v. *Mandujano*, 425 U.S. 564; *Garner* v. *United States*, 424 U.S. 648; *Bryson* v. *United States*, 396 U.S. 64.

b. Petitioners' double jeopardy claim is similarly insubstantial. They contend that because their convictions for securities fraud were based in part upon their nondisclosure of the facts underlying the Taft-Hartley convictions of petitioners David Stirling and Yanowitch in another district, their trial on the securities offenses violated the Double Jeopardy Clause.

As the court of appeals correctly ruled (Pet. App. 36a-37a), the two prosecutions were based upon entirely different acts. In the Taft-Hartley case, the government was not required to show any improper misrepresentation or nondisclosure concerning their labor relations. Conversely, on the securities fraud charge, the government was required to show only that there was a misleading failure to disclose the dealings with union representatives and not that the dealings constituted a Taft-Hartley offense or that petitioners themselves were the guilty parties. Since each offense required proof of facts that the other did not, the Double Jeopardy Clause does not bar prosecution for both. *Brown* v. *Ohio*, 432 U.S. 161, 166; *Blockburger* v. *United States*, 284 U.S. 299, 304.

2. Petitioners' objection to the court's charge with respect to the materiality of their misrepresentations (Pet. No. 77-1612, pp. 24-30) was not raised either

at trial or on appeal and there is no compelling reason for this Court now to consider the issue. *United States* v. *Lovasco*, 431 U.S. 783, 788 n.7; *United States* v. *Ortiz*, 422 U.S. 891, 898; Fed. R. Crim. P. 30.

In any event, the challenged instruction was not erroneous. Petitioners contend that the court improperly instructed the jury that it could find a statement or omission material if it "might" have induced an investor to act or not to act (Pet. No. 77-1612, p. 24). But in the portion of the charge quoted by petitioners (Pet. No. 77-1612, pp. 24-25 n.30), the court instructed the jury that the statement or omission had to be of such a nature that it "would or might reasonably have induced the person to act or not to act," and added that the jury would have to find that the information that was omitted or withheld "would, if disclosed, have significantly changed the nature of the information that was given" before it could find petitioners' actions material. Moreover, immediately before the challenged language the court instructed (Tr. 6009) that "[a]ll statements and omissions, though they might be of interest to somebody, are not necessarily material" and that "material fact in this setting is one which could reasonably be expected to induce a person relying on the statement to decide to act or not to act." This case is therefore unlike *TSC Industries, Inc.* v. *Northway, Inc.*, 426 U.S. 438, upon which petitioners rely, for in context the use of the word "might" did not suggest that conviction

could be based on a " 'mere possibility, however unlikely,' " *Id.* at 449.[4]

3. Petitioners further contend (Pet. No. 77-1612, pp. 30-36) that the trial court's instructions on the credibility of witnesses and reliance on expert advice were erroneous. The court of appeals properly rejected these claims (Pet. App. 48a-50a).

a. Petitioners did not object at trial to the court's credibility instructions. Nor would any objection have been called for, as those instructions were wholly unobjectionable. Petitioners' claim to the contrary is based upon their juxtaposition of two separate portions of the charge (Pet. No. 77-1612, pp. 30-31; Tr. 6068, 6070-6071), each of which was entirely proper. A general instruction on credibility, such as the first passage of which petitioners complain, is almost mandatory when there is conflicting testimony in the case. *United States* v. *Partin*, 493 F.2d 750 (C.A. 5). The second passage, relating to the special interest that a defendant has in the outcome of a criminal case, is also a standard and unobjectionable charge. *Reagan* v. *United States*, 157 U.S. 301, 304-311; *United States* v. *Figurski*, 545 F.2d 389, 392 (C.A. 4); *United States* v. *Preciado-Gomez*, 529 F.2d 935, 942

[4] Petitioners appear to contend further (Pet. No. 77-1612, pp. 26-29) that the court of appeals held as a matter of law that their failure to disclose their illegal conduct was material in their securities fraud trial. The court did not so hold. The jury was instructed on the issue of materiality and resolved that issue against petitioners. The court of appeals merely held the evidence sufficient to sustain the jury's verdict (Pet. App. 31a).

(C.A. 9), certiorari denied, 425 U.S. 953; *United States* v. *Martin*, 525 F.2d 703, 706 (C.A. 2), certiorari denied, 423 U.S. 1035.[5]

b. The court's instruction concerning reliance on expert advice was also correct. The court properly instructed the jury that reliance on expert advice could serve as the basis for a conclusion that petitioners acted in good faith, but that reliance on expert advice after failing to give the expert complete information did not constitute acting in good faith (Pet. App. 50a). See *United States* v. *Tolkow*, 532 F.2d 853 (C.A. 2); *United States* v. *Smith*, 523 F.2d 771 (C.A. 5), certiorari denied, 429 U.S. 817; *United States* v. *Barbato*, 471 F.2d 918 (C.A. 1).

4. Petitioners next challenge the trial court's ruling that David Stirling's guilty plea and Yanowitch's plea of *nolo contendere* in the Taft-Hartley prosecution could be used against them at trial (Pet. No. 77-

[5] Read as a whole, the charge made clear that the credibility of witnesses was a matter for the jury alone to determine (Tr. 6068-6069). The trial judge also instructed the jury that "the fact that somebody is interested doesn't mean he is lying" (Tr. 6072).

This case is therefore unlike *Quercia* v. *United States*, 289 U.S. 466, upon which petitioners rely. There the trial judge had said in the charge, "I think that every single word that man said, except when he agreed with the Government's testimony, was a lie" (*id.* at 468).

Petitioners' reliance on *United States* v. *Cisneros*, 491 F.2d 1068 (C.A. 5), and *United States* v. *Fischer*, 531 F.2d 783 (C.A. 5), is also misplaced. Both involve extreme situations where the trial judge's comments served as a direction to the jury to ignore the testimony of the witnesses for the defense.

1612, pp. 36-42). Petitioner Stirling testified at trial, and he was asked on cross-examination whether, on January 21, 1976 (the day he had pleaded guilty), he had admitted causing things of value to be delivered to union representatives. Yanowitch did not testify at trial, and his *nolo contendere* plea was not introduced.

Petitioners did not raise this point in the court of appeals, and it is therefore not properly presented here.[6] In any event, the cross-examination with respect to Stirling's guilty plea and his statements made at the time of the plea was proper. At the time of trial the plea had not been withdrawn.[7] Although it was withdrawn while the appeal was pending in the Second Circuit, it has subsequently been reinstated.[8] Petitioners' contentions with respect to a subsequently withdrawn guilty plea are therefore no longer ap-

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[6] Petitioners David Stirling and Harold Yanowitch moved in the court of appeals to dismiss the appeal and remand it to the district court when their pleas were withdrawn, so that they could move in the district court for a new trial (Pet. App. 36a n.15). Neither in that motion nor in their brief, however, did petitioners make the evidentiary arguments they now seek to raise.

[7] Introduction of evidence of a guilty plea as to which a petition to withdraw is pending is analogous to the use for impeachment purposes, under Rule 609(e), Fed. R. Evid., of a conviction as to which an appeal is pending.

[8] Reinstatement of the plea was ordered on May 24, 1978, by Judge Harold P. Burke of the United States District Court for the Northern District of New York. *United States* v. *Stirling*, N.D.N.Y., CR 74-318 (May 24, 1978).

plicable. A guilty plea is, of course, admissible as a judicial admission. See *United States* v. *Andreadis*, 366 F.2d 423, 433 (C.A. 2), certiorari denied, 385 U.S. 1001; McCormick, *Evidence* 635 (2d ed. 1972).

5. Petitioner Phillips argues (Pet. No. 77-1761, pp. 7-13) that the district court erred in not granting his mid-trial motion for a severance.

Although petitioner Phillips suggests that his role in the conspiracy was extremely limited and that he was, at most, a "peripheral" defendant (Pet. No. 77-1761, p. 9), the facts show otherwise. As the court of appeals noted, petitioner played the key role in orchestrating the most blatant misrepresentation in the entire Homex scheme (Pet. App. 46a). He established a corporation to contract with Homex for the purchase of several thousand apartments in Mississippi. He subsequently forged a letter from the Farmers Home Administration committing the FmHA to make a $15,000,000 loan to the corporation to purchase the apartments. He also drafted further documentation purporting to show sales to the Mississippi corporation, which Homex was able to enter on its books to satisfy its auditors and commercial bankers. These false documents were repeatedly used by the other defendants to write millions of dollars of phony earnings into Homex's books. Finally, petitioner provided repeated confirmations of these phony transactions, which were used to deceive Homex's auditors (Pet. App. 18a-20a). Plainly, in light of both his

substantial interest in Homex [9] and his important role in the fraud, petitioner was not the "peripheral" defendant that he pretends to be.

In pressing his severance argument, petitioner Phillips argues that his motion for a severance, if granted, would have resulted in his being tried for his offenses in Mississippi (Pet. 7, 11-12). He also contends that he was denied a severance on the basis of misrepresentations of the prosecutor (Pet. 4, 13). Neither contention is correct.

Even if petitioner's case had been severed from that of his co-defendants, venue would still have been proper in the Southern District of New York. A severance would not have altered the charges against petitioner, and venue for each of those charges was properly set in the Southern District of New York. Although petitioner lived in Mississippi and committed many of his unlawful acts in Mississippi, each of the offenses charged was carried out, in part at least, in the Southern District of New York. Petitioner's assumption that a severance would have resulted in a change of venue is therefore erroneous.

Similarly misleading is petitioner's claim that he failed to move for a severance at the beginning of trial because of a misrepresentation by the prosecutor that the proof against him would be more extensive than it was (Pet. 4, 13). In fact, the government offered evidence at trial that petitioner had made pay-

[9] Petitioner Phillips was Southern Region Vice-President of Homex and owned an option to purchase 40,000 shares in the corporation (Pet. App. 3a).

ments to public officials to influence their official actions in connection with certain Homex affairs. On petitioner's motion, two weeks into the trial, the district court excluded this evidence (Tr. 770-786). Having kept from the jury this proof, which would have helped demonstrate his more extensive involvement in the fraudulent scheme, petitioner cannot now claim that the district court was misled or that the government misrepresented the scope of its proof against him at the beginning of trial.

In sum, rather than calling for reassessment of the settled principle that motions for severance under Rule 14 are committed to the discretion of the district courts, this case helps demonstrate why that principle is a sound one. The district court was best able to determine whether petitioner was subject to undue prejudice because of the joinder, and the court properly ruled that the benefits of the joint trial far outweighed any prejudice to petitioner from proceeding together with his co-defendants. *Schaffer* v. *United States*, 362 U.S. 511; *Opper* v. *United States*, 348 U.S. 84.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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